

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	NO. 02-616-03
v.	:	
	:	CIVIL ACTION
THOMAS MASSARA	:	NO. 06-3185

MEMORANDUM

Baylson, J.

September 26, 2006

Defendant Thomas Massara (“Massara”) was convicted by a jury on several counts of mail fraud on October 6, 2003 in Criminal No. 02-616, and was sentenced to 27 months of incarceration on April 23, 2004.

At Massara’s request, the Court appointed new counsel for Massara. The new counsel advised Massara not to file a direct appeal, but rather to file post-conviction Motion under 28 U.S.C. § 2255, alleging incompetent trial counsel, and challenging his sentence under Blakely v. Washington, 542 U.S. 296 (2004). Massara’s first § 2255 Motion was filed on May 14, 2004 as Civil Action 04-2119, which this Court denied on September 23, 2004, with a lengthy Memorandum and Order, Docket No. 311.

Massara appealed the denial of his § 2255 Motion, and on October 5, 2004, the Third Circuit remanded the matter to this Court for the sole purpose of deciding whether to issue a certificate of appealability. On January 12, 2005, while the remand was pending, the United States Supreme Court decided United States v. Booker, 543 U.S. 220 (2005) and Massara promptly filed a motion with this Court seeking resentencing under Booker, or in the alternative,

permission to file a notice of direct appeal non pro tunc, alleging that his new counsel (appointed post-trial) was ineffective in advising him to seek collateral relief rather than direct review. Massara alternatively requested issuance of a certificate of appealability with regard to his § 2255 Motion.

This Court held a hearing on February 17, 2005, and on February 18, issued an Order vacating Massara's sentence under Booker and imposing a new sentence, which was the same as the first sentence, and denied the certificate of appealability.

With the remand thus concluded, Massara asked the Third Circuit for direct review of his new sentence, asserting an incorrect calculation of the loss attributable to his conduct, and also sought review of the issues decided in the § 2255 Motion, i.e., ineffective assistance of both trial and post-trial counsel and claims under Blakely, and requested a certificate of appealability.

In a non-precedential Opinion filed April 10, 2006, the Third Circuit decided that this Court did not have jurisdiction to resentence Massara and, therefore, vacated the new sentence and remanded for reinstatement of the original, albeit identical, sentence, and also concluded that Massara was not entitled to a certificate of appealability on his Blakely and ineffective assistance of counsel claims.

On May 18, 2006, this Court followed the decision of the Third Circuit by vacating its sentence of February 18, 2005 and reimposing the original sentence of April 23, 2004.

On July 19, 2006, Massara filed a second Motion in this Court under U.S.C. § 2255, which was also filed as Civil Action 06-3185, seeking relief from the sentence imposed on April 23, 2004. Another Motion was filed on August 17, 2006, also part of Civil Action 06-3185. The Court concludes that under the Anti-Terrorism and Effective Death Penalty Act of 1996, 28

U.S.C. §§ 2241-2266, this Court does not have jurisdiction over the pending Motion because it is a second or successive motion, and Massara must first get permission from the Court of Appeals to file such a motion in this Court.

The specific facts which Massara raises in his new § 2255 Motion are post-trial counsel's failure to file a notice of direct appeal, which Massara contends was prejudicial in that Massara's co-defendant, Sheila Dobson, did file a direct appeal and secured a new trial from the Third Circuit. See United States v. Dobson, 419 F.3d 231 (2005). Subsequently the government determined not to retry Ms. Dobson. In addition, Massara did not have the grounds he alleges in the current Motion when he filed his first Motion.

In a letter to the Court dated August 14, 2006, accompanying his Motion, Massara states: "I understand that this is a successive Petition because my counsel used § 2255 for sentencing in error. This is all part of the issues that I seek to have reviewed."

Under all the circumstances, because of the unforeseen and unforeseeable consequences of the events related above, Massara is now serving a sentence whereas his similarly situated co-defendant has gone free because of this Court's erroneous jury instructions and the decision of the government not to retry the co-defendant. As sympathetic as Massara's situation appears, this Court is without jurisdiction to hear Massara's new motion because it is clearly a "second or successive petition" under the A.E.D.P.A.

An appropriate Order follows.

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ORDER

AND NOW, this 26th day of September, 2006, for the reasons stated in the foregoing Memorandum, it is hereby ORDERED that Thomas Massara's Motions to Vacate, Set Aside, Correct Motion under § 2255, filed on July 19, 2006 and on August 17, 2006, (Doc. Nos. 346 and 348) are DISMISSED because this Court lacks jurisdiction, without prejudice to Defendant seeking leave in the Court of Appeals to refile this Motion.

BY THE COURT:

s/Michael M. Baylson

Michael M. Baylson, U.S.D.J.